Filed 2/15/11 P. v. Braswell CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. REBECCA GOLDEN BRASWELL, Defendant and Appellant.	2d Crim. No. B216826 (Super. Ct. No. 2006045961) (Ventura County)
THE PEOPLE, Plaintiff and Respondent, v. MATTHEW GERALD TOERNER, Defendant and Appellant.	2d Crim. No. B217217 (Super. Ct. No. 2006046652)

Rebecca Golden Braswell and Matthew Gerald Toerner appeal the judgment following their convictions for first degree murder (Pen. Code, §§ 187/189),[1] and conspiracy to commit murder (§ 182, subd. (a)(1)). The jury found a true special circumstance allegation against both appellants that the murder was committed while lying in wait. (§ 190.2, subd. (a)(15).) Braswell and Toerner were both sentenced to life

[1] All statutory references are to the Penal Code unless otherwise stated.

in prison without the possibility of parole for the murder and conspiracy, with the conspiracy sentence being stayed pursuant to section 654. Toerner was also sentenced to 25 years to life for personally using a firearm causing death. (§ 12022.53, subd. (d).)

Braswell contends the trial court erred by denying her motion for severance, and by admitting evidence of uncharged acts of prior domestic violence. Toerner contends the trial court erred by denying his *Miranda*[2] motion, and that there was no substantial evidence to support the murder conviction because the evidence showed that he killed in reasonable or imperfect defense of others. We affirm.

FACTS AND PROCEDURAL HISTORY

Braswell and John Marmo met while serving as Seabees in the Navy. They were married in December 2001 and filed for divorce in 2004. A daughter was born in March 2002. Marmo was no longer in the Navy during the time period relevant to the offenses, and Braswell was stationed at Port Hueneme Naval Base.

During their marriage, Braswell committed several acts of physical and verbal abuse against Marmo and, thereafter, the couple engaged in a protracted and acrimonious dispute over custody of their daughter. In early 2006, Marmo sought custody of his daughter because Braswell was being deployed to Iraq. Braswell falsely informed the court that she was not being deployed when, in fact, she was due to leave for Iraq the following day. The court issued a bench warrant and contempt citation against her, and she was brought back from Iraq. Thereafter, disputes concerning child visitation resumed, including Braswell's violation of court orders and threats against Marmo. The custody dispute had not been resolved when Marmo was killed.

Braswell had a friend and fellow Seabee, Shannon Butler. Starting in late 2005 and continuing until Marmo's murder on December 1, 2006, Braswell and Butler engaged in a course of conduct first intended to discredit Marmo and later to kill him. Butler told various individuals that Marmo was trying to harm her. She also reported to naval authorities that Marmo had left a threatening note on her car, and had arranged to

---

[2] (*Miranda v. Arizona* (1966) 384 U.S. 436.)

have her assaulted. After an investigation, naval authorities concluded that the accusations were fabricated. Butler admitted the fabrication.

Braswell and Butler also talked to fellow Seabees and other individuals about killing Marmo. Butler told several people that she wanted to hire someone to kill Marmo, and asked others about obtaining a gun or an explosive device.

These activities included conversations with Seabee Alan Greenwalt and a man named Nash Gomez. Braswell asked Greenwalt if he would kill Marmo or knew of anyone who would. Greenwalt declined but heard Braswell talking to several other persons about her desire to have Marmo killed. Butler approached Nash Gomez and asked him to kill Marmo. Gomez declined but agreed to cripple Marmo for life in return for $1,000. Gomez was paid half of the money but never performed his end of the bargain. Braswell offered Gomez more money and sexual favors to no avail.

In June 2006, Braswell bought a gun from a pawn shop in Arizona. Braswell gave the gun to Butler and, in July 2006, Butler told a man named Hoisington that Braswell had given her the gun, and asked Hoisington if he knew anyone who would kill Marmo. Butler also told a Seabee named Huddleson that she had obtained a gun from Braswell to be used to kill Marmo and offered money to Huddleson to do the shooting. Huddleson refused.

In July 2006, Braswell was staying at the home of Kim Schwartz and spoke to Schwartz about "having a hit out on" Marmo. Braswell talked about killing Marmo with Schwartz as late as October 2006. From July through October 2006, Braswell spoke to the paralegal in her divorce lawyer's office about killing Marmo by tampering with his car and made several other comments about Marmo disappearing.

For a brief period of time, Butler lived in Braswell's residence. On October 1, 2006, Braswell forced Butler to move out because Butler was not acting fast enough to eliminate Marmo. Butler promised to get the job done.

At some point, Butler asked acquaintances if they knew how to make a bomb. Seth Hardy and Toerner said that they did. Toerner talked to his girlfriend about killing Marmo because Marmo was a bad person and a bad father.

Braswell, Butler, Seth Hardy, and Jeffrey Rogers talked about killing Marmo by placing a propane canister inside Marmo's car and causing it to explode. On October 14, 2006, Marmo smelled propane gas, drove to a service station, and discovered that a propane canister had been strapped to an axle. On October 28, Marmo found another propane canister strapped to the bottom of his car. Seth Hardy admitted placing both canisters under Marmo's car.

On October 23, 2006, Hardy went to Marmo's workplace with a gun but left without incident. In November 2006, Butler, Toerner and Rogers drove to what they thought was Marmo's residence to scout the location for a shooting. They later returned with a gun intending to kill Marmo. Rogers and Toerner walked up to the residence but left after seeing a child inside. After Butler berated the two men, they returned to the residence the same evening but, again, had second thoughts and left without seeing Marmo. Braswell complained about their failure to get the job done.

Two days before the killing, a neighbor of Marmo, Laura Riley, saw Butler and Toerner in the area. On November 30, 2006, Butler rented a Dodge Durango. It was returned on December 1 without the keys. Braswell returned the keys to the car rental office later on December 1.

Early in the morning of December 1, Laura Riley heard a car pull up near Marmo's condominium. She heard voices and the sound of gunshots followed by the vehicle speeding away. Another neighbor heard someone say "woo-hoo" in a celebratory manner. Sheryl O'Neil, who lived with Marmo, heard gunshots shortly after Marmo had left the residence to go to work. She opened the door to find Marmo dying. Forensic evidence showed that Marmo was close to his car when he was shot, yet managed to get back to the door of his condominium before he collapsed and died.

On December 6, 2006, police arranged for Ivan Condit, a friend of Butler, to call Butler and offer to hide the gun police suspected was the murder weapon. Butler gave the gun to Condit who turned it over to the police. Bullets from the gun matched the bullets that killed Marmo, and the gun was identified as the gun Braswell had bought

in an Arizona pawn shop in June 2006. DNA on the gun was consistent with that of Toerner.

On December 11, 2006, detectives Joe Evans and Steve Rhodes from the Ventura County Sheriff's office interrogated Toerner in Okinawa where he was stationed at the time. Toerner stated that he had never met Braswell but was friends with Butler. Toerner admitted accompanying Seth Hardy and Butler when Hardy attempted to kill Marmo by attaching a propane gas tank to Marmo's car. Toerner admitted that Butler asked him to kill Marmo several times, and went with Butler to Marmo's residence for that purpose but was unwilling to perform the act. Toerner then admitted that, on the morning of December 1, 2006, he and Butler drove to Marmo's residence and that he shot Marmo when Marmo came out of his home to go to work. Toerner told the detectives that Marmo appeared surprised and that he did not see Marmo with a weapon in his hand.

Braswell did not testify or call any witnesses at trial. Toerner testified on his own behalf. In his testimony, Toerner admitted shooting Marmo after having waited approximately one minute at Marmo's residence. He testified that he shot Marmo to protect Butler. He also testified that he shot when he thought Marmo was reaching for a gun.

An amended information was filed in September 2007 charging Braswell and Toerner with murder and conspiracy to murder. A lying-in-wait special circumstance was charged against Toerner. Firearm allegations were also charged against Toerner.

On April 10, 2008, the trial court granted the prosecution's motion to consolidate the trials of Braswell and Toerner. Toerner's counsel opposed consolidation and Braswell had new counsel who reserved the right to move for severance later.

On January 1, 2009, Braswell moved for severance or reconsideration of the April 2008 consolidation order. Braswell argued that severance was warranted because the case against Toerner was stronger than the purely circumstantial case against her. Braswell also argued that the defendants had inconsistent defenses, and that there could be "prejudicial overflow" from the lying-in-wait special circumstance alleged against Toerner. The trial court denied the motion and the cases were tried together.

At the conclusion of the People's case in chief, the prosecution moved to amend the information to add a lying-in-wait special circumstance allegation against Braswell. The court deferred its ruling pending the presentation of further evidence. During the testimony of Toerner, the prosecution renewed its motion. Braswell objected, arguing that the defense lacked notice and the motion was too late, and that the evidence did not support the special circumstance. The trial court granted the motion and the information was amended to add a special circumstance of lying in wait against Braswell.

DISCUSSION

BRASWELL APPEAL

No Error in Denial of Severance Motion

Braswell contends the trial court abused its discretion by denying her January 2009 motion for severance. She argues that she was prejudiced by a joint trial because the prosecution would not have charged her with a lying-in-wait special circumstance if she had been separately tried. We disagree.

Section 1098 creates a strong legislative preference for joint trials where multiple defendants are "jointly charged with any public offense." The trial court, however, retains discretion to order separate trials "'. . . "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." . . .'" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 149-150; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40.) Separate trials are warranted if "'there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" (*Coffman and Marlow,* at p. 40.)

We review a trial court's ruling on a severance motion for abuse of discretion based on the facts at the time of the ruling. (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 41.) If the denial of severance was proper at the time it was made, a reviewing court may reverse a judgment only if the joint trial resulted in "gross unfairness amounting to a denial of due process." (*People v. Avila* (2006) 38 Cal.4th 491,

574-575.) We conclude that the trial court did not abuse its discretion in denying Braswell's severance motion, and that the joint trial did not result in gross unfairness to Braswell.

This is a "classic case" for a joint trial because Braswell and Toerner were charged with the same crimes involving common events and the same victim. (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 40; see *People v. Keenan* (1988) 46 Cal.3d 478, 499-500.) The case against Toerner was based on his confession while Braswell's was circumstantial, but Toerner's confession did not implicate Braswell and the evidence against each defendant was separate and distinct. There was also no prejudicial association of Braswell with Toerner based on conflicting defenses. Braswell's defense was to disassociate herself from the offenses and Toerner, consistent with this defense, claimed he had never met Braswell or communicated with her regarding the murder.

On appeal, Braswell neither renews the arguments she made at the time of her motion, nor claims an abuse of discretion for any other reason based on the facts at the time the trial court ruled. She contends that denial of her severance motion set the stage for the prosecution's midtrial motion to add a lying-in-wait special circumstance to the charges against her, and that the addition of the special circumstance was both an abuse of discretion and resulted in gross injustice to her. She argues that without a joint trial, Toerner's confession could not have been used against her and, without the confession, the evidence would not have been sufficient to support the addition of the lying-in-wait special circumstance against her.

As a preliminary matter, we disagree with respondent's argument that Braswell forfeited this issue on appeal because she failed to make the argument she now makes at the time the severance motion was decided. (*People v. Tafoya* (2007) 42 Cal.4th 147, 163.) Braswell was aware of Toerner's confession and the possibility it could be used against her if Toerner testified in their joint trial. Nevertheless, the prosecution's motion had not been made at that time, and Braswell raised the issue of the lying-in-wait special circumstance in general in her severance motion. Also, as stated above, review of a severance motion is not limited to the facts at the time of the motion in

situations where failure to sever results in "gross injustice amounting to a denial of due process." (See *People v. Avila, supra,* 38 Cal.4th at pp. 574-575.)

We acknowledge that Toerner's confession would have been inadmissible against Braswell in a separate trial because, presumably, he would not have testified and, therefore, would not have been available for cross-examination. But, the same admissibility issues would have been raised in a joint trial if Toerner had not testified. *Aranda/Bruton* and *Crawford* confrontation issues prevent the use of a non-testifying defendant's confession or other out-of-court statements to incriminate a codefendant when the declarant does not testify at trial. (See, e.g., *People v. Lewis* (2008) 43 Cal.4th 415, 453-454; *Crawford v. Washington* (2004) 541 U.S. 36; *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.) In essence, Braswell is arguing that a joint trial was unfair and prejudicial because it made it more likely that Toerner would testify.

Even if accurate, this factual assertion does not show either abuse of discretion by the trial court or unfairness from the joint trial sufficient to constitute a violation of due process. Severance may be granted when '"there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" (*People v. Lewis, supra,* 43 Cal.4th at p. 452; *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1196.) Braswell had the right to prevent use of Toerner's confession against her unless Toerner was available for cross-examination, but she had no right to avoid a joint trial or to avoid testimony from Toerner if Toerner chose to testify. The proper conduct of an otherwise warranted joint trial cannot prejudice a codefendant simply because it permits receipt of evidence damaging to the codefendant.

In addition, Braswell's argument also fails if it is characterized as a challenge, not to a joint trial, but to the trial court's order granting the prosecution leave to amend the information to add a lying-in-wait special circumstance against her. Under section 1009, a complaint or information may be amended as late as the close of trial provided the amendment would not prejudice the defendant's substantial rights. (*People*

v. Birks (1998) 19 Cal.4th 108, 129; *People v. Edwards* (1991) 54 Cal.3d 787, 827.) Permission to amend a complaint is reviewed for abuse of discretion and will be upheld on appeal in the absence of showing a clear abuse of discretion. (*People v. Bolden* (1996) 44 Cal.App.4th 707, 716.) The trial court did not abuse its discretion in granting leave to amend, and Braswell makes no contention to the contrary. The amendment could not be described as a surprise, and is not inconsistent with the evidence.

Braswell also claims that permitting the amendment changed the "very nature" of her potential punishment. She argues that it was grossly unfair to permit an amendment which raised her maximum punishment from 25 years to life to life without the possibility of parole. She cites no authority for this proposition or her assertion that life without the possibility of parole is different " in nature" from life with the possibility of parole. Established authority dictates that one consideration in deciding whether a trial court has abused its discretion in denying severance is whether joinder could result in imposition of the death penalty, but this authority does not extend to situations where the maximum penalty is life without the possibility of parole. (See, e.g., *People v. Lynch* (2010) 50 Cal.4th 693, 735-736.)

Furthermore, the joint trial did not prevent the jury from making a reliable judgment regarding the lying-in-wait special circumstance. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 452.) In addition to Toerner's confession, Marmo's neighbor testified that a period of time elapsed between the car driving up to Marmo's residence and the shots, and Marmo's girlfriend testified that Marmo was not shot until he left his house to go to work. In addition, there is evidence that Braswell knew Toerner and Butler would drive to Marmo's house to kill him in a surprise attack. Lying-in-wait murder consists of a concealment of purpose, substantial period of watching and waiting for an opportune time to act, and a surprise attack on an unsuspecting victim from a position of advantage. (*People v. Cruz* (2008) 44 Cal.4th 636, 679.) The special circumstance requires no particular waiting period as long as it continues long enough to premeditate and deliberate, conceal one's purpose, and watch for an opportune moment to attack. (*People v. Bonilla* (2007) 41 Cal.4th 313, 333.)

No Error in Admitting Evidence of Prior Domestic Violence

Braswell contends the court erred in admitting evidence of prior acts of domestic violence because the prejudicial effect of the evidence outweighed its probative value. (Evid. Code, §§ 1109, 352.) She argues that the prior acts involved emotional outbursts, not a propensity to engage in a cold-blooded killing. We disagree.

When a defendant is charged with a crime involving domestic violence, evidence of prior acts of domestic violence is admissible to prove a propensity to commit the charged offense, provided that such evidence is not inadmissible pursuant to Evidence Code section 352. (Evid. Code, § 1109, subd. (a).) The trial court has discretion to exclude the evidence if its probative value is substantially outweighed by a danger of undue prejudice, confusing the issues, or misleading the jury. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) In exercising this discretion, trial courts weigh such factors as the nature, relevance, and possible remoteness of the prior acts, their similarity to the charged offense, the degree of certainty the prior acts were committed, and the likelihood of confusing or misleading the jury. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) A trial court's ruling will be upheld unless the court '". . . exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.)

Here, the trial court admitted evidence of several prior acts of domestic violence by Braswell against Marmo, including an admission by Braswell to Marmo's sister that she hit him and locked him in their house, testimony by a neighbor regarding fights and other violence by Braswell against Marmo, testimony from two witnesses that Braswell punched and slapped Marmo, and testimony from a fellow Seabee that Braswell admitted stabbing Marmo in the leg with a knife. The trial court found that the balance of probative value and prejudicial impact weighed in favor of admission. We conclude there was no abuse of discretion.

Braswell argues that the prior acts evidence was prejudicial because she was not the person who shot Marmo and there was very little similarity between the prior acts and the charged offense. We disagree. The evidence was highly relevant to show a

pattern of behavior that began with domestic violence in the home, escalated into a bitter custody battle, and escalated further into the planning and murder of Marmo. (See *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027-1028.) Additionally, the prior acts were probative as to Braswell's state of mind and intent to kill. Braswell's defense at trial was to distance herself from the killing and deny any knowledge of what Toerner and Butler had planned. To counter this argument, the prosecution properly offered evidence of Braswell's history of abusive behavior to show the existence of a motive and propensity to commit violent acts against her ex-husband. Also, the prior acts were less inflammatory than the charged crimes so that the jury was not likely to convict her because of the prior acts. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 405.)

Braswell argues that the trial court failed to conduct an adequate balancing analysis required by Evidence Code section 352. "[A] trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under Evidence Code section 352." (*People v. Williams* (1997) 16 Cal.4th 153, 214; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1315.) In this case, the record shows the trial court satisfied these requirements.

TOERNER APPEAL

No Miranda Error

Toerner contends that the trial court erred by denying his motion to suppress his confession to the police. He argues that he never waived his *Miranda* rights because he was not told why he was being questioned, and was not expressly asked to waive his rights. (*Miranda v. Arizona, supra,* 384 U.S. 436.) We disagree.

"'. . . [A] suspect who desires to waive his *Miranda* rights and submit to interrogation by law enforcement authorities need not do so with any particular words or phrases. A valid waiver need not be of predetermined form, but instead must reflect that the suspect in fact knowingly and voluntarily waived the rights delineated in the *Miranda* decision. . . .'" (*People v. Hawthorne* (2009) 46 Cal.4th 67, 86.) A valid waiver may be express or implied, and a suspect's expressed willingness to answer questions after

acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights. (*Ibid.*) The question is whether the *Miranda* waiver was knowing and intelligent under the totality of the circumstances. (*Ibid.*; see *Berghuis v. Thompkins* (2010) 560 U.S. ___, ___ [130 S.Ct. 2250, 2261].) On review, we accept the trial court's determination of disputed facts supported by substantial evidence, and independently decide whether the challenged statements were obtained in violation of *Miranda*. (*People v. Davis* (2009) 46 Cal.4th 539, 586.)

Considering the totality of the circumstances, we conclude that Toerner made a knowing and intelligent waiver of his *Miranda* rights. Detective Joe Evans started by explaining that the interview was part of an investigation of the murder of John Marmo. He stated that the police believed Braswell was the perpetrator, and that Toerner was on a "list of people" who knew about the Braswell-Marmo relationship. Toerner responded by stating that he had gotten an e-mail from a friend saying "what was goin' on, so I kind of knew it was gonna happen."

At this point Detective Evans explained that, before they continued, he was going to read Toerner his rights. "So just pay attention to this." Evans stated that Toerner had the right to remain silent, that anything he said could be used against him in court, he had a right to have an attorney present at questioning and the right to an appointed attorney before any questioning. After the recitation of each of these rights, Evans asked Toerner, "Do you understand?" Toerner responded yes each time, clearly and unequivocally acknowledging that he understood his rights.

Detective Evans did not expressly ask Toerner if he was willing to waive those rights, and Toerner never expressly voiced such a waiver. The record, however, establishes an effective and intelligent implied waived of Toerner's *Miranda* rights. (*People v. Hawthorne, supra,* 46 Cal.4th at pp. 86-88.) When Toerner stated that he understood his rights, he answered all the questions posed by the police. Toerner showed no reluctance to discuss the incident, never requested the presence of counsel, and never attempted to terminate the interrogation.

Toerner argues that the interrogation occurred in a foreign country, he could not sleep in the days before interrogation, and had been drinking heavily during that period. He also asserts that he was 19 years old and, as a military man, respected authority. There is nothing in the record, however, that indicates that Toerner was anything but alert and in full control of his faculties.

Substantial Evidence Supports Conviction

Toerner contends there was insufficient evidence to support his conviction for first degree murder. Primarily relying on his own testimony, Toerner argues that substantial evidence supported his defense that he justifiably killed Marmo in defense of another (Butler) or, alternatively, that he was guilty only of voluntary manslaughter because he unreasonably killed in defense of Butler.[3] We disagree.

It is well established that, in considering whether there is sufficient evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence - that is, evidence that is reasonable, credible, and of solid value - from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Avila* (2009) 46 Cal.4th 680, 701.) A reviewing court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*Ibid.*)

Toerner misinterprets this standard for review by arguing that the existence of substantial evidence supporting his defense of another defense compels reversal regardless of the strength of the evidence in support of the jury's actual verdict. Toerner's focus on evidence supporting his defense is unavailing. It is not our function to reevaluate the evidence to determine whether the jury could or even should have reached a different result. (*People v. Prince* (2007) 40 Cal.4th 1179, 1281.) In this case, there was more than substantial evidence to support the jury's verdict that Toerner intentionally

[3] The trial court instructed the jury regarding both reasonable and imperfect defense of another. (CALCRIM Nos. 505, 571.)

killed with malice aforethought, premeditation, and deliberation. (See, e.g., *People v. Burney* (2009) 47 Cal.4th 203, 235.)

Evidence shows that Toerner participated in the planning of Marmo's murder by ambush, discussed making an explosive device, spoke to a friend about murdering Marmo, was involved in prior unsuccessful attempts to murder Marmo, and was told by Butler that he had redeemed himself for prior ineffective action. In addition, Toerner drove to Marmo's home on the day of the murder armed with a gun and shot the unarmed Marmo who had just come out of his house to go to work.

Conversely, there is no substantial evidence that Toerner killed in either reasonable or imperfect defense of another. Justifiable self-defense exists when a defendant has an actual and reasonable belief that another person is in *imminent* danger of being killed or suffering great bodily injury and the defendant believed that immediate use of deadly force was necessary to defend against the danger. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *In re Christian S.* (1994) 7 Cal.4th 768, 773, 783.) Imperfect defense of another exists when a defendant has an actual but unreasonable belief that another is in *imminent* danger of being killed or suffering great bodily injury and the defendant believed the immediate use of deadly force was necessary to defend against the danger. (*People v. Randle* (2005) 35 Cal.4th 987, 994, overruled on a different point in *People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1201.) In both defenses, belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. (*Humphrey*, at p. 1082.)

Here, there is no evidence that Butler was in any imminent danger from Marmo or that Toerner believed she was, and Toerner makes no such claim. Toerner's defense was that he believed Marmo had made threats and engaged in assaultive behavior against Butler in the past, and that he felt the need to prevent similar conduct by Marmo sometime in the future. In any event, the jury was instructed on Toerner's self-defense

and unreasonable self-defense theories and rejected them.

The judgments are affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Bruce A. Clark, Judge

Superior Court County of Ventura

Susan B. Lascher, under appointment by the Court of Appeal, for Appellant Braswell.

Susan S. Bauguess, under appointment by the Court of Appeal, for Appellant Toerner.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, John Yang, Deputy Attorney General, for Respondent.